

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
AMERICAN CIVIL LIBERTIES UNION OF) FOIA Control No. 2013-255
NORTHERN CALIFORNIA)
)
On Request for Inspection of Records)

MEMORANDUM OPINION AND ORDER

Adopted: July 29, 2014

Released: August 7, 2014

By the Commission:

I. INTRODUCTION

1. This Memorandum Opinion and Order grants in part and denies in part two applications for review (AFRs) of Freedom of Information Act (FOIA) decisions filed by the American Civil Liberties Union of Northern California (ACLU).¹ ACLU challenges two decisions by the Office of Engineering and Technology (OET) responding to a FOIA request for records concerning mobile tracking technologies and cell site simulators.² We find that OET conducted an adequate search for responsive documents, and was justified in withholding most of the material it declined to release. We find, however, that OET mistakenly withheld some e-mail communications that did not qualify as deliberative material. We will release these communications.

II. BACKGROUND

2. ACLU’s FOIA Request sought the following records “pertaining to mobile tracking technology commonly known as a StingRay or cell site simulator but more generically known as an IMSI Catcher” in products sold by Harris Corporation, Martone Radio Technology, and Cellxion:³

- Category A. Policies, procedures, practices, legal opinions, memoranda, briefs, correspondence (including e-mails), pertaining to IMSI catchers, including whether such devices can be manufactured, imported, sold, offered for sale, or used consistent with the Federal Communications Act or regulations promulgated thereunder and why such devices are or are not distinguishable from cell phone jammers.

¹ See Letter from Linda Lye, Staff Attorney, American Civil Liberties Union of Northern California to Sean Lev, [then] General Counsel (Jul. 18, 2013) (First AFR); Letter from Linda Lye to Sean Lev, [then] General Counsel (Oct. 23, 2013) (Second AFR).

² See Letter from Linda Lye to Federal Communications Commission (Apr. 11, 2013) (Request).

³ See Request at 1. The FOIA request defined IMSI catchers as “technology that simulates a cell tower and thus triggers an automatic response from wireless devices on a particular cellular network in the range of the device.” See *id.* at 3. ACLU’s Request specifically referred to Harris Corporation products: TriggerFish, Stingray, Stingray II, AmberJack, HailStorm, Kingfish, Loggerhead; Martone Radio Technology products: Max-G, Max-W, Spartacus, Spartacus-II products; and Cellxion products: Optima, Quadra, UGX-300, GX-200, GX-Duo, and GX-Solo. See *id.*

- Category B. Use of IMSI catchers to intercept the contents of communications, including prohibitions on the use of such interception functionality by law enforcement agencies.
- Category C. Communications with the wireless carriers (including, but not limited to AT&T, Verizon, Sprint and T-Mobile) regarding IMSI catchers and more generally, third party interception of wireless telephone communications.
- Category D. Requests for authorization pertaining to IMSI catchers, including but not limited to equipment authorization applications, license applications, experimental license or special temporary authority applications, and materials submitted to the FCC in support thereof.
- Category E. Review and analysis of requests for authorization described in category D above, including review and analysis of specific requests for authorization as well as generally applicable criteria and guidelines.
- Category F. Any other document pertaining to IMSI catchers, including but not limited to intraagency and interagency documents including, but not limited to the Department of Justice (and all of its components), the National Security Agency and the Department of Homeland Security.⁴

3. In its First Decision, OET found that the Commission had no records responsive to categories A, B, C, or F of the Request.⁵ With respect to categories D and E, OET found no records concerning either Martone Radio Technology products or Cellxion products.⁶ OET stated that information concerning Harris Corporation (Harris) products is publicly available in the Commission's Equipment Authorization System (EAS) database, and additionally released several letters supporting Harris' equipment authorization applications and a letter from Harris seeking confidential treatment for certain information in its applications.⁷ OET, however, withheld other documents related to the Harris applications under FOIA Exemptions 4,⁸ 5,⁹ and 7(E).¹⁰ OET also withheld "certain intra-agency and interagency emails and documents because they are classified or because taken together with other information they could endanger national and homeland security"¹¹ under Exemptions 1,¹² 5,¹³ 7(A),¹⁴ and 7(E).¹⁵ OET did not specify the category of the Request to which these documents related.

⁴ See Request at 3-4.

⁵ See Letter from Julius P. Knapp, Chief, Office of Engineering and Technology to Linda Lye (Jun. 19, 2013) (First Decision) at 2.

⁶ See *id.*

⁷ See *id.*

⁸ See 5 U.S.C. § 552(b)(4) ("trade secrets and commercial or financial information obtained from a person and privileged or confidential").

⁹ See 5 U.S.C. § 552(b)(5) ("inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency").

¹⁰ See 5 U.S.C. § 552(b)(7)(E) ("records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.").

¹¹ See First Decision at 2.

4. ACLU's First AFR asserts that OET's search was inadequate and that OET did not adequately justify the application of the various exemptions that OET relied on in withholding records. More specifically, ACLU asserts, first, that in applying Exemption 4, OET did not demonstrate that disclosure of the records would cause competitive harm or impair the government's ability to obtain information. Second, ACLU points out that Exemption 5 does not apply to communications with private entities or to factual, as opposed to deliberative information. Third, with respect to Exemption 7(E), ACLU faults OET for not showing that the records in question were compiled for law enforcement purposes and contends that information concerning the use of IMSI catchers cannot be withheld because such uses are already publicly known. Fourth, ACLU argues that OET did not justify the application of Exemption 1, because the use of IMSI catchers has been publicly acknowledged and OET did not show how disclosure would harm national security. Finally, ACLU disputes OET's invocation of Exemption 7(A) on the grounds that OET did not show that the relevant records were compiled for law enforcement purposes or identify the investigation that would be harmed by disclosure.

5. After consultation with the Office of General Counsel (OGC),¹⁶ OET concluded that the most efficient means for resolving the issues raised in the First AFR would be for OET to issue a supplemental response to the Request. ACLU agreed with this approach and OET accordingly issued its Supplemental Decision providing further explanation concerning the scope of its search and its reasons for invoking the various exemptions.¹⁷

6. In its Supplemental Decision, OET explained that it had consulted with all bureaus and offices that were likely to have responsive materials.¹⁸ OET stated that the information withheld under Exemption 4 concerning Harris' authorization applications constituted trade secrets and thus competitive harm was not an issue in its analysis.¹⁹ Further OET explained that the material withheld under Exemption 5 consisted of intra- and interagency e-mails (not communications with private parties) containing deliberations about the grant or denial of authorizations.²⁰ As to Exemption 7(E), OET related that material withheld consisted of the portions of intra- and interagency e-mails reflecting consultation with law enforcement agencies about investigation techniques, the details of which are not publicly known.²¹ Finally, OET indicated that material withheld under Exemption 1 was classified by agencies that shared this information with the Commission and that the technical information withheld has not been publicly disclosed.²² OET noted that the Commission does not have declassification authority.²³

¹² See 5 U.S.C. § 552(b)(1) (records that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order").

¹³ See *supra* note 9.

¹⁴ See 5 U.S.C. § 552(b)(7)(A) ("records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings").

¹⁵ See *supra* note 10.

¹⁶ See 47 C.F.R. § 0.461(j) note.

¹⁷ See Letter from Julius P. Knapp, Chief, Office of Engineering and Technology to Linda Lye (Sept. 23, 2013) (Supplemental Decision) at 1.

¹⁸ See *id.* at 2.

¹⁹ See *id.* at 2-3.

²⁰ See *id.* at 3.

²¹ See *id.*

²² See *id.* at 4.

²³ See *id.*

7. ACLU's Second AFR is directed at OET's Supplemental Decision.²⁴ In its Second AFR, the ACLU asserts that the Supplemental Decision failed to provide adequate responses to the objections in the First AFR. Thus, ACLU contends that the arguments described in paragraph 4, above, continue to apply with equal force, despite the issuance of the Supplemental Decision. More specifically, ACLU contends that OET's Supplemental Decision failed to demonstrate that the search conducted was reasonably calculated to uncover all relevant documents. As to Exemption 4, ACLU argues that OET still has not shown that the material withheld is confidential. With respect to Exemption 5, ACLU argues that deliberative material may not be withheld if it is adopted by the agency or is the agency's "working law." ACLU also asserts that material regarding IMSI catchers may not be withheld under Exemption 1, because government use of IMSI catchers has been publicly disclosed. Finally, ACLU contends that OET did not show that any responsive records were compiled for law enforcement purposes, as required for application of Exemption 7, or that disclosure would pose a risk of circumvention of the law under Exemption 7(E).

III. DISCUSSION

8. Upon review of OET's decisions, and the ACLU's arguments, we grant in part and deny in part the ACLU's AFRs.

9. **Scope of Search.** We agree with ACLU that OET did not fully demonstrate that it conducted a search "reasonably calculated to uncover all relevant documents."²⁵ The Supplemental Decision lists the bureaus and offices that were consulted as part of the search for responsive records, but does not otherwise describe the methodology employed or the records searched.²⁶ We nevertheless find that the search was in fact adequate. We have determined that OET followed the standard procedures employed when the Commission receives a FOIA request.²⁷ OET, the office that is the primary custodian of records for records responsive to this request, was designated the lead office for responding to the FOIA Request by the Commission's FOIA Office.²⁸ OMD/PERM and/or OET also contacted the Public Safety and Homeland Security Bureau, the Wireless Telecommunications Bureau, the Office of General Counsel, and the Enforcement Bureau for the purpose of searching for and locating the records. ACLU's FOIA Request was circulated by e-mail to the personnel of the relevant bureaus and offices. After ACLU filed its First AFR, OET also contacted the Office of Strategic Planning and Policy Analysis, and the Consumer and Governmental Affairs Bureau, to search for responsive records.²⁹ Commission staff understand that, upon receiving a FOIA request, they are required to forward any responsive records in their files, as well as responsive records available from other sources, such as databases, to which they have access.³⁰ In this regard, we are justified in relying on staff to apply their personal knowledge of

²⁴ See *supra* note 1.

²⁵ See *id.* at 1; *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

²⁶ See Supplemental Decision at 2.

²⁷ 47 CFR 0.461(d)(2), (e)(1), (f)(1)

²⁸ Pursuant to the Commission's FOIA Directive, FCCINST 1179.2 (Apr. 16, 2012) ¶ 4(D)(3), available at <http://transition.fcc.gov/foia/e-room-foia-management-2012.pdf>, the Performance Evaluation and Records Management Branch of the Office of Managing Director (OMD/PERM) is responsible, where multiple bureaus or offices are likely to have responsive documents, for assigning FOIA requests to a lead bureau or office to prepare an initial response with the assistance of other offices and bureaus.

²⁹ See Supplemental Decision at 2.

³⁰ Under the Commission's FOIA Directive, bureaus and offices are responsible for thoroughly searching files and records for the material requested. See FCCINST 1179.2 ¶ 5(D)(1)(c).

relevant matters and to identify relevant sources of records.³¹ Accordingly, we are satisfied that an adequate search was conducted in response to ACLU's Request.³²

10. **Exemption 4.** We disagree with ACLU's contention that OET improperly relied on Exemption 4 because it failed to demonstrate that the withheld material was confidential. We find that OET properly justified withholding certain records associated with Harris' equipment authorization applications under Exemption 4 as trade secrets.³³ These records contain schematics, photographs, and other materials describing the circuitry, functions, and operation of the device encompassed by the applications. OET found that disclosure of this material would reveal valuable proprietary information about technologies that Harris has developed and its manufacturing process that would give Harris' competitors unwarranted insight into the specifics of Harris' products. OET therefore concluded that the material falls within the definition of trade secrets for purposes of Exemption 4.³⁴

11. ACLU's Second AFR does not address OET's finding that this information should be withheld as trade secrets. Instead, ACLU argues that OET failed to justify a finding that the withheld material is confidential for purposes of Exemption 4 – *i.e.*, that OET did not show that disclosure would impair the government's ability to collect relevant information or that disclosure would cause competitive harm.³⁵ ACLU thus equates OET's finding that the exempt material constitutes trade secrets with a finding that it is confidential. The two standards, however, represent separate and distinct bases for applying Exemption 4.³⁶ OET made no finding that the material met the standard for being confidential, as opposed to the criteria for being a trade secret. Because ACLU fails to challenge OET's trade secrets finding, the Second AFR provides no basis to question OET's Exemption 4 analysis, which appears correct.³⁷

12. **Exemption 5.** We find that OET properly withheld the majority of communications related to Harris' equipment authorization applications under the deliberative process privilege encompassed by Exemption 5. The deliberative process privilege permits withholding information about intra-agency and inter-agency communications that is both predecisional and deliberative.³⁸ Here, it

³¹ See *American-Arab Anti-Discrimination Committee v. U.S. Dep't of Homeland Security*, 516 F. Supp.2d 83, 87-88 (D.D.C. 2007) (crediting statement by employee with personal knowledge that agency did not maintain responsive records).

³² See *Electronic Frontier Foundation*, 26 FCC Rcd 14925, 14927 ¶ 9 (2011) (where multiple bureaus and offices diligently searched for relevant information and talked to relevant personnel in an effort to discover whether responsive material existed and where it might be found, search was adequate); *Leo Wrobel, Jr.*, 21 FCC Rcd 2848, 2850 ¶ 6 (2006) (fact that search failed to produce a particular document does not render search inadequate where search was clearly designed to uncover relevant documents).

³³ See Supplemental Decision at 2-3.

³⁴ See *id.*; see also *Public Citizen Health Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983), which defined a trade secret for purposes of the FOIA as a "secret, commercially valuable . . . process or device that is used for the making . . . of trade commodities and that can be said to be the end product of either innovation or substantial effort."

³⁵ See Second AFR at 2, citing *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1112 (9th Cir. 1994); *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

³⁶ See *Public Citizen Health Group v. FDA*, 704 F.2d at 1286 (if documents are trade secrets, no further inquiry is necessary; otherwise a showing of confidentiality must be made).

³⁷ Our review of the records disclosed a sales brochure distributed to law enforcement agencies for Harris' Stingray device. We direct OET to release this brochure with Exemption 4 material redacted.

³⁸ To fall within the scope of the deliberate process privilege encompassed by Exemption 5, records must be both pre-decisional, *i.e.*, "[they were] generated before the adoption of an agency policy [*i.e.*, a decision]," and deliberative, *i.e.*, "[they reflect] the give-and-take of the consultative process. See *Senate of the Commonwealth of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987).

applies to the records properly described by OET as intra-agency and inter-agency documents including e-mails between personnel of the FCC and other federal agencies³⁹ discussing components and design elements of the subject devices and the propriety and/or the conditions under which equipment authorization could or should be granted.⁴⁰

13. Our examination of the responsive e-mails confirms that, in the main, they consist of exempt staff deliberations. The e-mails are both predecisional and deliberative and therefore fall within the scope of Exemption 5. The e-mails include the discussion of several topics relevant to whether Harris' equipment authorization applications should be granted and on what terms. The topics discussed include (1) the procedures applicable to processing the applications, (2) the factors to be taken into account in ruling on the applications, (3) Harris' request for confidentiality, (4) whether conditions should be attached to any grant of the applications, and (5) the application of equipment labeling requirements to Harris' devices. We find that these e-mails are deliberative, inasmuch as they reflect the staff's exchange of views on these topics. We also find that the communications are predecisional, since they were discussions preliminary to the decisions granting the applications and were in no sense adopted by those decisions once they were made.

14. We are thus unpersuaded by ACLU's observation that material cannot be found predecisional if it is effectively adopted by an agency as its position on an issue or is used in dealings with the public,⁴¹ or if it represents the agency's "working law."⁴² It is well established that the predecisional character of a document is not altered by the fact that an agency has subsequently made a final decision, even if the final document reflects the predecisional material.⁴³ We see no indication that OET intended to adopt or incorporate the exempt material in its decisions.⁴⁴

15. As to ACLU's observation that any factual, as opposed to deliberative, material must be disclosed unless it is inextricably intertwined with exempt material,⁴⁵ we found no segregable factual material. The staff sometimes made reference to factual matters in the course of their discussions, but we see no way of segregating these passing references in an intelligible manner without disclosing the staff's deliberations. Further, inasmuch as disclosure of this type of deliberation would tend to chill staff discussion, we find no basis to release this material on a discretionary basis.

16. We will, however, modify OET's findings in some respects. We find that some e-mail chains withheld by OET incorporate a number of e-mails between FCC personnel and personnel of Harris, which were apparently overlooked by OET in its Supplemental Decision. These e-mails do not fall within the scope of Exemption 5 because they are not intra-agency or inter-agency communications, inasmuch as Harris is a private party who is not acting in a capacity that is "intra-agency."⁴⁶ We therefore direct OET to disclose them. However, we further find that some of the material in these e-mails is exempt and should be redacted. This includes the names of lower-level Commission employees, which

³⁹ See *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001) (threshold requirement for applying Exemption 5 is that the documents are intra-agency or inter-agency communications).

⁴⁰ See Supplemental Decision at 3.

⁴¹ See Second AFR at 2; *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

⁴² See Second AFR at 2; *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 152-53 (1975).

⁴³ See, e.g., *Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 359-60 (1979); *Electronic Privacy Information Center v. Transportation Sec. Admin.*, 928 F.Supp.2d 156, 169 (D.D.C. Mar 07, 2013); *John Dunbar*, 23 FCC Rcd 9850, 9851 (2008).

⁴⁴ *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975) (agency may waive the deliberative process privilege by choosing expressly to adopt or incorporate protected material by reference).

⁴⁵ See Second AFR at 2; *Ryan v. Dep't of Justice*, 617 F.2d 781, 790-91 (D.C. Cir. 1980).

⁴⁶ See *supra* note 39.

are exempt under Exemption 6.⁴⁷ We also find that the kind of technical information previously described as exempt under Exemption 4 should be redacted from the e-mails here. To the extent the chains contain intra-agency e-mails subject to Exemption 5, as discussed below, these should also be withheld.

17. Additionally, we find that a document attached to one of the e-mails is not predecisional. This document consists of a chart summarizing standards for granting certain kinds of confidentiality requests. We find that the chart has been adopted by OET as an internal set of guidelines that are used generally by OET staff in resolving confidentiality requests, although it is not a formal binding regulation. It therefore constitutes OET's "working law" (for making confidentiality determinations) not covered by Exemption 5.⁴⁸ We direct OET to disclose it to ACLU.

18. **Exemption 1.** Finally, we find that OET properly withheld records under Exemption 1.⁴⁹ We find no merit to ACLU's claim that that Exemption 1 does not apply because the Government has officially acknowledged its use of IMSI catchers (*e.g.*, FBI production of documents pursuant to a separate FOIA)⁵⁰ and that no explanation was provided as to why the disclosure could be expected to harm national security.⁵¹ Our review of the agency's records withheld under Exemption 1 reveals that they are classified, and thus, subject to the application of Exemption 1.⁵² We further find that the fact that the government generally acknowledged in separate litigation that it uses IMSI catchers does not change the analysis. The documents here concern matters that are not in the public domain. These records relate to spectrum management, and their release could harm our national security by disclosing operational parameters, inasmuch as widespread knowledge of these parameters could compromise the effective operation of systems using the spectrum. Finally, we find that any further description in a public document such as this memorandum opinion and order could compromise these operational parameters.⁵³

⁴⁷ Exemption 6 protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." See 5 U.S.C. § 552(b)(6). See also *Judicial Watch, Inc. v. U.S.*, 84 Fed. Appx. 335, 338-39 (4th Cir. 2004) (names of lower level IRS employees protected under Exemption 6). We find that disclosure of the employees' names might subject them to harassment and that disclosure would not serve a substantial public interest.

⁴⁸ See *NLRB v. Sears Roebuck & Co.*, 421 U.S. at 153; ("Exemption 5, properly construed, calls for disclosure of all opinions and interpretations which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be.") (*citations and quotations omitted*). See also *Brennan Center for Justice at New York University School of Law v. U.S. Dep't of Justice*, 697 F.3d 184, 199-200 (2d Cir. 2012) (if an agency's memorandum or other document has become its "effective law and policy," it will be subject to disclosure as the "working law" of the agency) and *Electronic Frontier Foundation v. Dep't of Defense*, No. C 09-05640 SI (N.D. Cal. 2012) (document containing FBI policies and protocols considered working law, not covered by Exemption 5), reported at 2012 WL 4364532 at *13 n.10.

⁴⁹ We note that some of these documents are interagency or interagency documents pertaining to IMSI catchers and thus responsive to Category F of ACLU's request. Accordingly, we find that OET was incorrect in finding that there were no documents responsive to Category F. Nonetheless, we find that the error was harmless, given the fact that OET identified the documents in its decision and provided an adequate justification for withholding them.

⁵⁰ See *EPIC v. FBI*, No. 12-667 (D.D.C. Apr. 27, 2012) (relevant material can be found online at <http://epic.org/privacy/litigation/>.) We conducted a comprehensive review of the released document set, and found that a significant portion of all documents were either wholly or partially redacted.

⁵¹ See Second AFR at 4.

⁵² Because we find that OET properly withheld these documents under Exemption 1, we do not reach the question of whether they might also be exempt under Exemption 7.

⁵³ See *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30-31 (D.C. Cir. 1998) (agency must show with reasonable specificity why documents fall within the exemption, but too much detail could defeat the purpose of the exemption; in special circumstances, even minimal detail can constitute sensitive information).

IV. ORDERING CLAUSES

19. IT IS ORDERED that the applications for review filed by the American Civil Liberties Union of Northern California ARE GRANTED in part and ARE DENIED in part. ACLU may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).⁵⁴

20. The officials responsible for this action are the following: Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai, and O’Rielly.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁵⁴ We note that as part of the Open Government Act of 2007, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect ACLU’s right to pursue litigation. ACLU may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Telephone: 301-837-1996
Facsimile: 301-837-0348
Toll-free: 1-877-684-6448.